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No. 1101

In the Supreme Court of the United States

OCTOBER TERM 1946

UNITED STATES OF AMERICA, APPELLANT

vs.

FRANKLIN P. KROMER

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Eastern District of Pennsylvania

No. 13842

UNITED STATES OF AMERICA

v.

FRANKLIN P. KROMER

STATEMENT AS TO JURISDICTION

In compliance with Rule 37 (a) (1) of the Federal Rules of Criminal Procedure and Rule 12 of the Supreme Court of the United States, as amended, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on January 24, 1947, dismissing the information.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment of the district court is conferred by the Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 State. 271; 18 U. S. C., Supp. V, 682, commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, 28 U. S. C. 345.

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STATUTES INVOLVED

Section 13 of the Revised Statutes, as amended by the Act of March 22, 1944, c. 123, 58 Stat. 118, 1 U. S. C., Supp. V, 29, provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

Section 1 (b) of the Emergency Price Control Act of January 30, 1942, 56 Stat. 23, as amended, 50 U. S. C. App., Supp. V, 901 (b), provides:

> The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1946, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority

granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

THE ISSUE AND THE RULING BELOW

The defendant Kromer was charged in an information in two counts filed in the district court on August 29, 1946, with having willfully demanded and received, in October 1945, rents for certain housing accommodations in excess of those allowed by the Emergency Price Control Act of 1942 and regulations promulgated thereunder by the Office of Price Administration.

The defendant moved to dismiss the information on the ground that the Emergency Price Control Act of 1942 and the regulations promulgated thereunder had expired on June 30, 1946, prior to the filing of the information. The district court, in an order entered January 24, 1947, granted the motion to dismiss. The court based its decision[1] on the grounds that the general

[1] The district judge filed a short opinion on December 27, 1946, which incorporated by reference his opinion of December 20, 1946, in *United States* v. *Palletz*, No. 13841.

saving statute (R. S. § 13, as amended, *supra*, pp. 1–2) was inapplicable in view of the inclusion in the Emergency Price Control Act of 1942 of a special saving clause (*supra*, p. 2), that under the latter provision, authority to prosecute for offenses committed prior to June 30, 1946, was limited to cases in which prosecution was commenced prior to that date, and that since the information in the instant case was not filed until after that date, the prosecution was barred. The decision of the district court thus involves a construction of both the general saving statute and of the saving clause of the Emergency Price Control Act of 1942, and its ruling is subject to review by the Supreme Court on direct appeal. See, e. g., *United States* v. *Borden Co.*, 308 U. S. 188, 194–195.

THE QUESTION IS SUBSTANTIAL

The decision of the district court that the general saving statute is inapplicable to prosecutions under the Emergency Price Control Act of 1942, and that under the saving clause of the latter statute authority to prosecute for offenses committed prior to its expiration on June 30, 1942, is limited to cases in which prosecution was commenced prior to that date, is of manifest importance. Such a restrictive interpretation hampers effective enforcement of the rent control program and is contrary to the legislative policy as expressed in the Emergency Price Control Act of

1942 and the Price Control Extension Act of July 25, 1946, Public No. 548, c. 671, 79th Cong., 2d sess.

Resolution of the question whether the Government could, after June 30, 1946, initiate prosecutions for rent and price ceiling violations which occurred prior to that date depends upon the proper construction of the general saving statute and the saving clause included in the Emergency Price Control Act. The district court held that the clause in the general saving statute reading, "unless the temporary statute shall so expressly provide," removes the instant case from the operation of that statute because of the inclusion in the Emergency Price Control Act of a special saving clause. However, decisions of the Supreme Court make it clear that such a result follows only if the provisions of the Emergency Price Control Act expressly or by plain implication cut down the scope of the general rule established by the general saving statute. See, e. g., *Hertz* v. *Woodman,* 218 U. S. 205, 217. That such is not the situation is obvious from the fact that the two saving clauses—the general statute and that included in the Emergency Price Control Act of 1942—are by reason of their similarity in construction and language, *in pari materia.*

The district court based its construction of the saving clause of the Emergency Price Control Act on an interpretation of the word "sustaining" there employed as applying only in respect of

actions pending at the time of the expiration of the Act; the court stated that to "sustain" an action means to support or carry on an action already in existence. However, that construction ignores the facts that the general saving statute, which, as stated, is *in pari materia,* itself uses the word "sustaining," and that the Supreme Court has consistently applied the general provision to permit prosecutions commenced after the repeal or expiration of a statute, so long as the right of action existed prior to that time. See *United States* v. *Reisenger,* 128 U. S. 398; *Great Northern Railway Co.* v. *United States,* 208 U. S. 452; *Hertz* v. *Woodman, supra.* See also *United States* v. *Standard Oil Company,* 148 Fed. 719, 726 (N. D. Ill); *United States* v. *C. S. and P. M. Northern Railway Co.,* 151 Fed. 84 (D. Minn.), affirmed, 162 Fed. 835 (C. C. A. 8), certiorari denied, 218 U. S. 579–580; *Lang* v. *United States,* 133 Fed. 201 (C. C. A. 7).

We submit therefore that under both the general saving statute and the special provision of the Emergency Price Control Act, the United States is given the right to maintain enforcement actions for violations of the Act committed during its life, even though such proceeedings might not be commenced until after its expiration. This issue is important because large numbers of similar situations are now pending in the courts or are under consideration for institution of legal action.

Appended hereto is a copy of the memorandum of the district court entered on December 27, 1946, and a copy of the court's opinion of December 20, 1946, in *United States* v. *Lionel Palletz*, No. 13841.

(S) GEORGE T. WASHINGTON,
Acting Solicitor General.

(S) GERALD A. GLEESON,
United States Attorney for the Eastern District of Pennsylvania.

In the District Court of the United States for the Eastern District of Pennsylvania

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No. 13842—June Sessions, 1946

UNITED STATES OF AMERICA

vs.

FRANKLIN P. KROMER

SUR MOTION TO DISMISS

DECEMBER 27, 1946.

WELSH, *J.*

On August 29, 1946, the United States filed a criminal information wherein it charged that the defendant named therein wilfully demanded and received from one, Charles D. Moore, the sum of $200.00 as rent for and in connection with the use or occupancy of housing accommodation known and designated as 217 Stonoway Lane, Herion Township, Montgomery County, Pennsyl-

vania, whereas the maximum legal rent therefor under the provisions of the Rent Regulation for Housing was or is $65.00 per month, contrary to and in violation of Emergency Price Control Act of 1942 as amended, Section 4 (a); Rent Regulation for Housing No. 28, Sections 2 (a), 4 (a) and 9 (a).

The issues raised by the defendant's present motion are identical with the issues involved and determined by this Court in the case of *U. S.* v. *Palletz,* No. 13841, June Sessions, 1946. In the latter case we granted the motion to dismiss, and for the same reasons contained in *U. S.* v. *Palletz* the present motion to dismiss is likewise granted.

An order may be entered accordingly.

In the District Court of the United States for the Eastern District of Pennsylvania

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No. 13841—June Sessions, 1946

UNITED STATES OF AMERICA

v.

LIONEL PALLETZ

SUR MOTION TO DISMISS

Filed Dec. 23, 1946

DECEMBER 20, 1946.

WELSH, *J.*

On August 29, 1946, the United States filed a criminal information containing ten counts

wherein it charged that the defendant named therein wilfully demanded and received from five enumerated persons a sum or sums as rent for and in connection with the use or occupancy of housing accommodations known and designated as 6236 North Broad Street, Philadelphia, Pennsylvania, in excess of the maximum legal rents therefor established under the provisions of the Rent Regulation for Housing No. 28, contrary to and in violation of the Emergency Price Control Act of 1942 as amended, Section 4 (a); Rent Regulation for Housing No. 28, Sections 2, (a), 4 (a) and 9 (a). The information alleges that the total overcharges amount to three hundred and forty-five dollars ($345.00).

The defendant filed a motion to dismiss the information on the ground that the Emergency Price Control Act of 1942 as amended and regulations issued pursuant thereto terminated on June 30, 1946, and since the United States failed to bring a prosecution prior to the expiration date of the Act, that is, June 30, 1946, it is now without authority to prosecute the present information which was filed August 29, 1946.

1. All the acts constituting the alleged violations of the Act occurred prior to June 30, 1946, the expiration date of the Act. It is conceded that at common law the repeal of a penal statute operates as a remission of all penalties for violations of it committed before its repeal, and a release from prosecution therefor after said repeal.

U. S. v. *Reisinger,* 128 U. S. 398. The foregoing principle is based on the presumption that the repeal was intended as a legislative pardon for the past acts. (*U. S.* v. *Johnson,* 53 Fed. Supp. 167.) The application of the rule has been confined to the repeal of statutes, but logic requires that its application be extended to include temporary statutes—statutes which continue in force for a limited time only by express provisions.

2. Of course, if there exists a saving clause in a statute expressly authorizing prosecutions, the prosecution is saved despite the common law rule that the repeal of a penal statute bars prosecution or further prosecution for violations of a statute before the repeal. It is the opinion of this Court, however, that no such clause exists with regard to the instant case and the prosecution must fall.

3. It is urged by the Government that the General saving statute, Rev. Stat., Sec. 13, which since the amendment of 1944, 1 U. S. C. A., Sec. 29 supp., has applied to temporary statutes in addition to repeal statutes, saves the present prosecution. This general saving statute provides: "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statutes, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability (R. S. Sec. 13). The

expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." As amended March 22, 1944, c. 123, 58 Stat. 118.

It appears to us that the effect of the language in the general saving statute "unless the temporary statute shall so expressly provide" is to remove from the operation of the statute temporary statutes which themselves contain express saving clauses. As the Emergency Price Control Act of 1942 as amended contains a specific saving clause, Sec. 1 (b), 50 U. S. C. A., Appendix, Sec. 901 (b) supp., such saving clause supersedes the provisions of the general saving statute and therefore a discussion in the instant case follows.

4. Sec. 1 (b) of the Emergency Price Control Act as amended provides: "The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1946, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except

that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense." As amended June 30, 1945, c. 214, Sec. 1, 59 Stat. 306.

For the purposes of this argument the pertinent words are: "* * * except as to offenses committed * * * prior to such termination date, the provisions of the Act * * * shall be treated as still remaining in force for the purpose of sustaining any proper * * * prosecution, with respect to any such * * * offenses." The Government filed its information on August 29, 1946, or almost two months after the expiration of the Emergency Price Control Act. Notwithstanding, it contends that the present prosecution is saved because the word "sustaining" appearing in the saving clause is synonymous with the word "commencing", and therefore empowers the United States to bring prosecution after the expiration date of the Act for offenses committed during the life of said Act. We are not disposed to accept this contention for the reason that a fair reading of the language of the saving clause precludes such a liberal construction. Furthermore, the saving clause consti-

tutes an abrogation of the common law principle discussed supra and acceptance of a liberal construction advanced by the Government would do violence to the doctrine that statutes abridging or abrogating the common law must be strictly construed. To read into the saving clause the word "commencing" as contended by the Government so as to save future prosecutions as well as pending prosecutions for offenses committed during the effective period of the Act a clear expression of the will of Congress to that effect must be shown. No such clear expression is present in the instant case.

In interpreting the word "sustaining" we hold it to be synonymous with the word "maintaining" and to denote "support of 275 U. S. 56; *Garner* v. *Mengel Co.,* 50 Fed. Supp. 794.

Webster's Dictionary lends some authority to the conclusion that "sustaining" refers to the supporting or upholding of something already in existence. It recognizes eight definitions of the word "sustain" (see 7 and 8) and gives as its basic definition "to maintain or give support, to cause to continue in existence".

It was held in *George* v. *Connecticut Fire Ins. Co.,* 201 Pac. 510, 23 A. L. R. 80, that "the word sustain" may be susceptible of several constructions and has been defined as to mean to carry on or to maintain, which is the general meaning of the term.

5. It will be observed in passing that a saving clause, like other statutory provisions in regard to criminal offenses, is construed strictly in favor of defendant. Since the saving clause of the Emergency Price Control Act is susceptible of several constructions, the strict construction which is most favorable to the defendant should be adopted.

6. We conclude that 1 (b) of the Emergency Price Control Act of 1942 as amended saves only prosecutions which had already been commenced during the effective period of the Act and has no reference to prosecutions commenced subsequent to the termination date of the Act. Accordingly, the prosecution in the instant case must fall since it was commenced subsequent to the termination date of the Emergency Price Control Act of 1942 as amended—the criminal information having been filed and the summons issued on the same day, August 29, 1946, and the Act having expired on June 30, 1946. The question whether or not the present prosecution would have been saved if it were shown that some other proceedings, such as Hearing before the Commissioner, in connection with the present prosecution had been held prior to the termination date of the Emergency Price Control Act is not here determined. The determination of that question depends to a large extent upon whether or not a Hearing before the Commissioner constitutes a prosecution commenced

or in progress. On the record it appears that a Hearing before the Commissioner was not had in the case at bar and the question need not be determined.

7. The final contention of the Government is that Sec. 18 of the Price Control Extension Act of 1946 (Public Law 548, 79th Congress, Chapter 671, 2nd Session), which provides in part that "all regulations, orders, price schedules and requirements under the Emergency Price Control Act of 1942, as amended * * * and the Stabilization Act of 1942, as amended, which were in effect on June 30, 1946, shall be in effect in the same manner and to the same extent as if this Act had been enacted on June 30, 1946 * * *" operates to save the present prosecution. The late decisions of the Supreme Court define an ex post facto law as one which, in its operation, makes that criminal which was not so at the time the action was performed, or which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of the party to his disadvantage. It has already been decided in the foregoing discussion that as of the termination date of the Emergency Price Control Act, as amended, the defendant was no longer subject to criminal prosecution. If the effect of Sec. 18 of the Price Control Extension Act of 1946 would be to permit now a prosecution to be brought against said defendant it would

operate to substantially alter the situation to the disadvantage of the defendant, contrary to the provisions of the Constitution prohibiting ex post facto laws.

For the reasons found in the foregoing opinion the motion to dismiss the information is granted.

An Order to that effect may be entered accordingly.

U. S. GOVERNMENT PRINTING OFFICE: 1947